IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-1666

JOHN QUINN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EVSEROFF & SONENSHINE,
Attorneys for Petitioner
186 Joralemon Street
Brooklyn, New York 11201

JEFFREY A. RABIN and
WILLIAM SONENSHINE
Members of the Bar of the Supreme
Court of the United States,
Of Counsel

INDEX

APPENDICES PAGE

AUTHORITIES CITED PAGE

UNITED STATES CONSTITUTION

Amendment Four and Fourteen of the United States Constitution

Article 1 Section 6 of the New York State Constitution

STATUTES

18 United States Code Section 2518 (8)(a) and (10)(a) and New York State Criminal Procedure Law Section 700.50 and 700.65

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. _____

JOHN QUINN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully prays to this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit as follows:

A.

OPINION BELOW

The United States Court of Appeals for the Second

Circuit, by a judgment entered the 27th day of April, 1977, affirmed a judgment in the United States District Court, Eastern District of New York, convicting petitioner of one count of Conspiracy, violation of Title 18 United States Code, Section 371, upon his plea of guilty before Hon. Thomas Pratt.

The conviction was unanimously affirmed without opinion.

B.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked under Title 28 Section 1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1 of the Rules of this Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on April 27, 1977 as aforesaid. A copy is reproduced as Appendix A to this petition.

C.

THE QUESTION PRESENTED FOR REVIEW

1. Did the lower court err when it permitted the use of evidence from a suppressible eavesdrop to be used as probable cause for a subsequent eavesdrop.

2. Did the lower court err when it held that tape recordings derived from a court ordered eavesdrop need not be sealed until the conclusion of said order and its extension.

3. Did the failure of the prosecutor to serve a timely 90 day notice of termination of eavesdropping upon petitioner, require suppression of the evidence obtained under various eavesdropping warrants.

D.
THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes involved are New York Criminal Procedure Law Article 700 and Amendments Four and Fourteen to the United States Constitution and Article One Section Six of the New York State Constitution and Title 18 U.S. Code, Section 2518 (a).

The pertinent portions are set forth in the Appendix B of this petition.

E.
A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO CONSIDERATION OF THE QUESTIONS PRESENTED

1. Preliminary Statement

Petitioner, John Quinn, appealed from a judgment of the United States District Court for the Eastern District of New York (Hon. Thomas Pratt, United States District Judge entered on October 15, 1976, convicting him on his plea of guilty to one count of conspiracy in violation of Title 18 United States Code, Section 371) and sentencing him to a term of imprisonment of three (3) years.

Petitioner's guilty plea followed the denial of his motion to controvert and suppress certain court ordered evidence derived therefrom which court orders authorized the interception of conversations over certain telephonic instruments. It was stipulated between the government and the defense with the approval of the district court that the appellant would be permitted to take an appeal from the denial of suppression and remain free on bail pending the appeal to the United States Court of Appeals for the Second Circuit.

2. Evidence Adduced at the Hearing To Controvert and Suppress

Pursuant to an investigation into auto theft, the District Attorney's Office in Nassau County obtained from Justice Altimari, on March 15, 1974, an order for a wiretap for thirty days on the telephone of Myron Schnell in Commack, New York. No renewals or extensions were requested. The wiretap terminated on April 16 and Justice Altimari signed an order sealing the tapes of the intercepted conversation on May 1, 1974.

While the Schnell wiretap was in operation, conversations to which Thomas Fury, petitioner's co-defendant, was a party were intercepted. Fury had not been named in the Schnell wiretap order. In July, 1974, he was notified in writing that his conversations had been intercepted during the Schnell tap.

In April, 1974, the Queens County District Attorney submitted the affidavit of a New York City detective who had been investigating Fury and others with respect to the crimes of grand larceny and criminal possession of stolen property. Also supporting the wiretap application was the affidavit of a Nassau County detective. The detective inter-

preted certain conversations intercepted during the Schnell wiretap and to which Fury had been a party as indicating criminal activity. The transcripts were attached to the affidavit.

On April 26, 1974, a New York State Supreme Court Justice (Dubin, J.) granted the application and issued the order for a wiretap on Fury's telephone in Queens County. This time Fury was named in order as a "target" of the tap.

Justice Dubin's order authorized a wiretap for thirty days. Two thirty-day extensions of this order were subsequently obtained and the wiretap ended on July 25, 1974. On July 31, 1974 Supreme Court Justice Leonard Fine issued an order sealing the tapes of the intercepted conversations.

Both Quinn and Fury were overheard during the Fury wiretap. Fury was served with notice of the tap on April 1, 1975, after Justice Dubin had twice postponed the service of notice upon application of the District Attorney. Quinn was never formally notified under the New York statute that his conversations had been intercepted during the Fury wiretap. He was so notified, however, on February 20, 1976, by the United States Attorney's Office through his attorney.

3. The Decision of the District Court.

At the conclusion of the hearing, Judge Pratt denied the motion to controvert and suppress. His opinion, which was read into the record at the close of the hearing, is set forth as Appendix C to this petition.

F.

THE BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT

The jurisdiction of the the United States District Court for the Eastern District of New York was invoked upon the ground that the crime charged was a violation of Federal Law, to wit, Title 18 United States Code, Sections 371, 2312 and 2.

G.

ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

POINT ONE

IT WAS ERROR FOR THE COURT TO DENY PETITIONER'S MOTION TO SUPPRESS THE TAPES IN THE INSTANT MATTER BASED UPON THE FAILURE OF THE EXECUTING AUTHORITIES TO TIMELY SEAL THE TAPES

The petitioner sought to suppress the tapes which the government possessed because of a failure by the interceptors to have said tapes sealed as was required by the applicable statutes.

There were two wiretaps conducted by the New York State authorities, the fruits of which were sought to be suppressed. The first wiretap occurred in Nassau County and was conducted pursuant to court orders and under the supervision of the Nassau County District Attorney's Office. The second wiretap was based upon information derived from the first but was conducted in Queens County under the supervision of the Queens County District Attorney's Office.

The prosecutor conceded for purposes of the lower court's decision that the Nassau County authorities failed to properly seal the tapes recorded pursuant to their order, that the delay cannot be explained and that it was not a reasonable delay. Thus, the court was asked to concentrate upon the Queens order and their execution. The following is a chart that may aid in determining the issues to be presented with regard to the Queens' order and its extensions and amendments:

DATE OF ORDER	EFFECTIVE DATE	TERMINATION DATE	SEALING DATE	LENGTH OF DELAY
4/26/74	4/29/74	5/28/74	7/3/74	63 days
5/28/74 (ext.)	5/29/74	6/27/74	7/31/74	34 days
6/12/74 (ext.)	6/12/74	6/27/74	7/31/74	34 days
6/27/74 (ext.)	6/27/74	7/26/74	7/31/74	5 days

It is petitioner's contention that the reasons advanced by the government for the delays are insufficient to prevent the suppression of the tapes. In any event the excuse put forth by the government relates to the lapsing of five (5) days between the expiration of the June 27, 1974 extension and the actual sealing without considering the prior thirty four (34) and sixty three (63) day delay. The mere recitation that it was understood that sealing is only required after an order and its extensions terminate is refuted by case law and the legislative history of the statutes involved. In view of the fact that the orders in question were issued to state authorities pursuant to the state statutes, the applicable law should be determinative in deciding whether there was compliance with sealing requirements. The following arguments will concentrate on such state law with necessary references to the federal statutes and pertinent case law.

It is contended that the electronic surveillance in the case at bar was conducted in such a manner as to violate the defendant's rights under the Fourth Amendment of the United States Constitution

Article 700 of the New York Criminal Procedure Law and Title 18 United States Code.

SEALING

The failure of the Queens County District Attorney's Office to promptly and properly seal the tapes of the conversations seized and recorded immediately upon the expiration of each thirty day surveillance period as required by CPL §700.50 [2] and Title 18 U.S. Code § 2518 [8a] required the court to suppress from use at trial the conversations seized under the eavesdrop order.

A reading of CPL §700.50 [2] and Title 18 US Code §2518 [8a]* will reveal that there exists no ambiguity or equivocation in these statutes. It simply states that immediately after a respective wiretap order has expired, the People must transport the original tape recordings to the issuing Justice, and he must seal the tapes.

The use of the word immediately was not chosen casually by the Legislature. When one compares the sealing requirement with other provisions within CPL Article 700, one will find no such similar mandated time requirements.**

*From hereon any reference to Sections of Article 700 of the New York Criminal Procedure Law should be deemed to include a reference to the appropriate section of Title 18 United States Code. [18 US. Code §251 (8)(a)].

**Thus, CPL Section 700.65 [4] which is addressed to the amendment process the Legislature determined that amendments be made "as soon as practical". Likewise, CPL Section 700.50 [3] which requires the serving of inventory notice upon those conver-

**sations have been monitored and intercepted speaks in terms of "...within a reasonable time...". Nowhere else is it required that an act under the wiretap article be accomplished "Immediately" except for sealing.

Turning to the facts applicable to sealing, we note that the tapes in this case were not sealed by Justice Dubin or any other judge until July 31, 1974. Thus, the gap between the termination of the first eavesdrop order (May 28, 1974) and the date of sealing (July 31, 1974) was in excess of two months.

Clearly, this tardiness in bringing the tapes to the Supreme Courthouse cannot realistically be said to comply with Section 700.50 [2].

The New York State Court of Appeals in its recent decision in People v. Sher, 38 N.Y. 2d 600 (Feb. 19, 1976), stated unequivocally that the language in Section 700.50 [2] is to be strictly construed. Judge Jasen, writing the decision for an unanimous Court held that:

> '[W]e held that the sealing requirements must be strictly construed. The need for rigid adherence to the statutory procedure is explained by the history of our present wiretapping provisions. Until 1968, the Federal Communications Act of 1934 prohibited any person unauthorized by the sender from intercepting and revealing the contents of any communication (citations omitted)".
>
> " The Federal Communications Act modified to permit states to intercept wire and telephone communications in accordance with the congressional and constitutional guidelines. (47USC 605). Thereafter, our state revised its electronic surveillance statute (citation omitted). The provisions of Article 700 of the Criminal Procedure Law track, as they must, the language of the federal law. From this review of legislative history, it is clear that the requirements of Article 700, which are reflective of controlling federal

> "law, must be strictly construed."
>
> "Among the congressional requirements was the direction that the intercepted wire or oral communications be... made available to the judge that issued the warrant for sealing under his direction."

(See: People v. Sher, supra, 38 N.Y. 2d at 603).

Additionally, it must be remembered that Article 700 exists in derogation of the common law. This fact in conjunction with the statute's interference with individual privacy and personal liberty likewise compels strict construction. * Noting the rules for statutory construction established in McKinney's Consolidated Laws of New York, Book 1 Statutes, one finds that strict construction is prescirbed for statutes in derogation of the common law.

> " The Legislature in enacting statues is presumed to have been acquainted with the common law, and generally, statutes in derogation or contravention thereof, are strictly construed..."

And, concerning statutes which operate to interfere with individual privacy or liberty, Section 311' points out:

*See: In Re Mayers, 169, N.Y.S. 2d 839 (Ct. of Gen'l Sess. N.Y., 1957); Tilbro Home Builders, Inc. v. Leidel, 42 A.D. 2d578, 344 N.Y.S. 2d 614, Rev'd on other grou nds, 35 N.Y. 2d 347, 361 N.Y.S. 2d 895 (1957).

" A statute which infringes on common rights is strictly construed".

In light of the aforementioned authority, there can be no question that when this statute says "immediately", it means quite literally, "immediately". *

In addition to resolving the issue of strict construction, recent cases have also addressed themselves to whether a defendant must demonstrate prejudice from a failure to seal. The Court of Appeals in People v. Nicoletti, 34 N.Y. 2d 249, 356 N.Y.S. 2d 855 (1974), conclusively answered this question. In Nicoletti, the People contended that absent a showing of prejudice evolving from non-sealing, the tapes should not be suppressed. In that case, no proof was offered that the People had tampered with the tapes. In fact, the defendant did not even make that allegation. Nevertheless, the Court ordered all electronically seized evidence to be suppressed, holding:

" There is, of course, no indication whatsoever that the tape recordings herein were altered in any way and we intimate no such use. It is the potential for such abuse to which we address ourselves."

****

" Through skillful editorial manipulation alterations may be undetectable, or, if detectable at all, then only by the most sophisticated devices and techniques

*The term "immediately" is defined in Webster's New World Dictionary Second Edition, to mean"... without delay; at once; instantly". and 'forthwith' have the same meaning. They are stronger than the expression 'within a reasonable time' and imply promptly, vigorous action without any delay (Citations omitted).

" involving time consuming and expensive analysis by technical experts. While not foolproof, sealing reduces the risk of such manipulation to tolerable limits."

****

" The sealing requirement is to be strictly construed and it is not the defendant's burden to come forward with evidence of tampering when unsealed recordings are sought to be introduced as evidence".

People v. Sher, supra, provided the Court with an opportunity to reevaluate their position adopted eight months prior to Nicoletti. In a strong reaffirmation, the Court wrote:

" The sealing requirement was designed to prevent the abuse of wiretap recordings. To that end, as we held in Nicoletti, the requirement must be strictly construed. The burden is on the prosecution to establish due compliance with the statutory procedures. We adhere to the rules announced in Nicoletti".

The case at bar demonstrates remarkable similarities to the factual circumstances extant in People v. Simmons, 84, Misc.2d 749, 378 N.Y.S. 2d 262 (S.Ct. 1975), unanimously (affirmed by the Appellate Division, First Department, October 13, 1976, upon the lower court's decision). In Simmons, the Court was faced with a series of wiretaps "...each prompted by the fruits of the previous surveillance...". In that case, the Court considered the failure of the People to "immediately" seal six separate eavesdropping orders. The delays involved ranged from 21 days to 109 days. In Simmons, as in Nicoletti

there was no allegation on the part of the defendant that any impropriety or tampering had occurred.

In the well-reasoned decision by Judge Gorman in People v. Simmons, supra, the effect of each of the aforementioned facts were systematically analyzed. Beginning with the geometric structure of the wiretap orders themselves - that is, one growing from the derivative fruits of its predecessor the Court found that suppression of any given warrant additionally required the suppression of "... all communications and evidence derived therefrom..."* Since the mainstay of each affidavit in support of successive warrants were the exploitation or derivative use of evidence gained in pre-existing tapes, the defendant asserts that the suppression of any warrant in the instant case would require the suppression of all subsequent warrants.

Secondly, the Court in Simmons reached the crucial issue of the effect of an interim delay upon wiretaps, which are subsequently judicially sealed.

> " Finding that the delay in sealing was not excusable, the court must now decide whether suppression is mandated.
>
> " With one exception (citation omitted) the courts have equated a delay in sealing with no seal at all and have forgiven the delay upon only satisfactory explanation thereof (citations omitted)"
>
> ********
>
> " Since the absence of a seal statutorily precludes the introduction of tapes into evidence and our State's highest court ordered

*In accord, see People v. Brown, 80 Misc. 2d 777, 364 N.Y.S. 2d 364 (S.C.t 1975); People v. Koutnk, 37 N.Y. 2d 873, 874-875 (1975).

> "suppression in the absence of a seal, this court is setting no precedent and has no alternative in barring the use of recordings at trial".

Finally, Simmons reiterated the position established in Nicoletti that a defendant has no burden to demonstrate prejudice from the lack of prompt sealing.

> " In Nicoletti, the court carefully pointed out that no indication of any alteration appeared, but that '[i]t is the potential for such abuse to which we address ourselves. '"

Research has not disclosed a single case in which interim sealing delays of the proportions reached here were tolerated*. In fact, the courts of this state, strictly construing the provisions of 700.50 [2] have imposed stringent requirements before compliance will be found.

In the decision in People v. Guenther, 81 Misc. 2d 258, 366 N.Y.S. 2d 306 1975, the Court found that an interim delay of seven days before electronically

*Insofar as the decision in People v. Blanda, 80 Misc. 2d 79, 362 N.Y.S. 2d 735 (S.Ct. 1974), is inconsistent with this statement, it is noted that the court in Blanda, recognized the existence of a valid excuse for a four day delay. However, since Blanda predates the decision in Nicoletti, and furthermore, since the Court held that Section 700.50 [2] should be liberally construed, the defendant respectfully asserts that the holding has been overruled sub silentio by Nicoletti and Sher. Similarly, in People v. Carter, 81 Misc. 2d 345, 365 N.Y.S. 2d 964 (Nass. Cty, Ct. 1975) an eight-day interim delay was tolerated. However, no similar excuse for such delay is present in this case.

recorded tapes were sealed required suppression. The Court held "...the sealing requirement must be strictly construed 'to prevent tampering, alterations or editing;' to aid in establishing the chain of custody; and to protect the confidentiality of the tapes..." Finding no valid explanation for a seven day hiatus between the cessation of the wiretap and judicial sealing, the court suppressed all electronically seized evidence.

Recently the United States Court of Appeals for the Second Circuit also reaffirmed its position that the failure to seal in a timely manner requires suppression of that intercepted. In United States v. Gigante, et al., F. 2d (Cir., June 22, 1976, per Kaufman CJ) it was held that the Government's failure to timely seal electronically intercepted conversations was a violation of the Federal "sealing" requirement, (18 U.S.C. 2518 [8a]) which requires that the tape recordings be suppressed from use at trial. Furthermore, the Court of Appeals rejected the Government's contention that a failure to promptly seal should not require the "drastic remedy" of suppression. (See also United States v. Giordano, 416, U.S. 505, 527 [1974]; United States v. Chavez, 416, U.S. 562 [1974]).

For all of the aforementioned reasons stemming from the District Attorney's failure to comply with C.P.L. Sec. 700.50 [2], all of the conversations electronically intercepted should have been suppressed by the lower court.

POINT TWO

EVIDENCE DERIVED FROM A SUPPRESSIBLE EAVESDROP SHOULD NOT HAVE BEEN PERMITTED TO BE USED AS PROBABLE CAUSE FOR A SUBSEQUENT EAVESDROP

The lower courts have held in the instant matter that even though the initial tape recordings were suppressed because of improper sealing such did not preclude the intercepting officers from using the information gained as a basis for probable cause on a subsequent eavesdrop. In support of said theory, the courts interpreted New York Criminal Procedure Law, Section 700.65 to so authorize. It is submitted that such a holding is erroneous and violative of petitioner's constitutional rights.

If the Second Circuit's reasoning is adopted and sealing be deemed a ministerial act in regard to Section 700.65 subdivisions 1 and 2 of the New York Criminal Procedure Law, then such would conflict with prior holdings relating to sealing itself. The theory in suppressing the use of tapes because of improper sealing is that a potential danger exists for tampering with said tapes which would be prejudicial to an accused. (See People v. Sher, , 38 N.Y. 2d 600 [1976]; People v. Nicoletti, 34 N.Y.2d 248;256 N.Y.S. 2d 855 [1974]; People v. Simmons 84 Misc. 2d 749; 378 N.Y.S. 2d 262 [affirmed Appellate Division, First Department New York, 1976]; People v. Guenther, 8 Misc. 2d 258, 366, N.Y.S. 2d 306 [1975]; United States v. Gigante, 538 F. 2d 502 [2d Cir. 1967].

It is thus apparent why trial or grand jury testimony regarding information derived from

unsealed or improperly sealed tapes is prohibited by statute (see N.Y.C.P.L., section 700.65 [3]). The disparity in the two areas cannot be logically reconciled. Recognizing the potential danger that exists in altering unsealed tapes, the courts have forbidden their use during a trial or grand jury proceeding as well as the fruits therefrom. Permitting the use of the very same potentially tainted or altered evidence as a basis for subsequent court orders whose execution and sealing may be legal presents the same prejudicial situation as the taking of testimony.

Alteration of a tape recording is the evil that courts have sought to prevent by suppressing tapes when the "potential" for alteration exists even without an allegation of altering.

> "There is, of course, no indication whatsoever that the tape recordings herein were altered in any way and we intimate no such use. It is the potential for such abuse to which we address ourselves.
>
> *******
>
> Through skilfull editorial manipulation, alterations may be undetectable or, if detectable at all, then only by the most sophisticated devices and techniques involving time consuming and expensive analysis by technical experts. While not foolproof, sealing reduces the risk of such manipulation to tolerable limits." (People v. Nicoletti [supra]).

The potential danger to an accused is not diminished because tainted information is passed on by one law

enforcement agency to another rather than used at a trial or in a grand jury. The ability to alter a tape and use such as the basis of future court orders equally jeopardizes an accused's constitutional rights as tainted testimony.

It is submitted that this "fruit of the poisonous tree" not be permitted to be used in a manner which circumvents petitioner's constitutional rights. (See Nardone v. United States, (1939) 308 U.S. 338, 84 L. Ed. 307, 60 S.Ct. 266).

While it is recognized that the usual application of the aforementioned doctrine is to situations where the admission of evidence in a criminal case is prohibited when it is derived from information gained in an unlawful manner it is submitted that it should be considered and applied in the instant situation. The absence of sealing does not in and of itself establish any illegality in the manner in which evidence was derived but casts doubt upon the integrity of said evidence once it is gathered. Whether evidence is established through improper methods or acquired properly and then altered the exclusionary rule should apply because the inherent danger is the same.

The exclusionary rule has developed in our judicial system in the past century (Weeks v. United States, (1914) 232 U.S. 383, 58 L. Ed. 652, 34 S.Ct.341; Wolf v. Colorado, (1949) 338 U.S. 25, 93 L.Ed. 1782, 69 S.Ct. 1359; Mapp v. Ohio, (1961) 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684, 84 ALR 2d 933; Olmstead v. United States (1928) 277 U.S. 438, 72 L.Ed. 944, 48 S.Ct. 564, 66 LAR 376; Terry v. Ohio, (1968) 392 U.S. 1, 20 L. Ed. 2d 889, 88 S.Ct. 1868; Silverthorne Lomber Co. v. United States (1920) 251 U.S. 385, 64 L.Ed. 319, 40 S.Ct. 182, 24 ALR 1426; Nardone v. United States [supra]). This court has recognized that the prohibition in question must be a

flexible one. This limitation is well stated in Wong Sun v. United States, (1963) 371 U.S. 471 9 L. Ed. 2d 441, 83 S. Ct. 407, wherein the court held inadmissible against the defendant certain narcotics seized pursuant to an illegal arrest, but specifically refused to hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police.

This qualification represents a policy decision that the need for deterrance does not extend so far as to require affirmative punishment by making facts unlawfully discovered forever unusable since all that is deemed necessary is that police officers be deprived of any benefit from their unlawful conduct. If the government can show that it obtained the challenged evidence by lawful means and from a source completely independent of the illegality, the policy is satisfied, and an awareness by police that only information obtained in the proper manner will be usable, should be sufficient to deter unlawful conduct. (Note - Fruit of the Poisonous Tree - A plea for Relevant Criteria, 115 University of Pennsylvania Law Review 1136).

It is thus apparent that prosecutorial agencies must be governed with a stern but fair hand without sacrificing the constitutional rights of an accused. In the instant matter permitted the use of potentially tampered evidence against petitioner through nontestimonial means abridges his constitutional rights and should not be permitted.

POINT THREE

THE COURT ERRED IN NOT SUPPRESSING THE CONVERSATIONS OF PETITIONER, JOHN QUINN BECAUSE OF THE FAILURE OF THE INTERCEPTING AUTHORITIES TO NOTIFY HIM WITH THE TIME PERIOD SET FORTH BY THE STATUTE

It is our contention herein that since the eavesdropping pursuant to Mr. Justice Dubin's order of April 29, terminated by July 26, and that since the order postponing notice terminated on May 10th 1975, the appellant was thereafter, within 90 days from May 10 entitled to the statutory notice pursuant to NewYork Criminal Procedure Law Section 700.50. Mathematically computed, the 90 day period following May 10 would expire on August 10.

Such service of the stautory notice has not occurred as of the date of original motion some 150 days past the 90 day period.

In People v. Huston, 34, N.Y. 2d 116, 356, N.Y.S. 2d 272, the New York Court of Appeals dealt with the question of giving the statutory notice. Judge Rabin writing for an unanimous court at 34 N.Y.S. 2d 121:

> " The People admit that they did not give written post-termination notice required by the statute. While we may assume that the lack of such notice might ordinarily require suppression of the evidence obtained as a result of the warrant (see People v. Tartt,

"71 Misc. 2d 955, 336 N.Y.S. 2d 919, supra), we believe that the special circumstances present in this case compel a different conclusion".

The Court then detailed the unique circumstances which governed its decision in this case. The case at bar, however, presents no such extraordinary situation upon which the prosecution can rely to relieve itself of its default. The underlying judicial philosophy applicable here are in words expressed in U.S. v. Giordano, 469 F. 2d 522, 530:

> " We cannot relegate provisions after provision to oblivion by terming each a mere 'technicality' -or else we leave the statute a shadow of itself, an apparation without substance."

An interesting corollay is found in the case of Olmstead v. U.S., 277 U.S. 438, 485, S.Ct. 564, 575:

> [when]"government becomes a law breaker, it breeds contempt for law".

See also People v. Kennedy, 75 Misc. 2d 347 N.Y.S. 2d 377. A detailed discussion of the history and purpose of the 90 day provision is found in People v. Tartt, 71 Misc. 2d 955, 336 N.Y.S. 2d 919, (Supreme Court, Erie County 1972), cited with approval in Huston, supra.

In that case the court granted a motion to suppress intercepted conversations purusant to an eavesdropping order where there was a failure to comply with the ninety day statute. The court pointed out (336 N.Y.S. 2d 923-926):

" Turning first to the failure of the People to give notice of the fact that an order authorizing interception had been granted, the date thereof, the period authorized and the fact that oral communications had been intercepted, it must be emphasized that if this omission is fatal it is because it conflicts with a statutory commandment of the Congress of the United States and of the New York State Legislature without reference to the authorizing order which purported to relieve the People of that requirement. How strictly this and other provisions of the Federal and State Acts should be read depends largely on one's reading of the judicial and legislative history leading up to the enactment of Title III of the Omnibus Crime Control and safe Street Acts of 1968, Sec. 2510 et seq. of the U.S. Code. The New York statutes, Article 700 and 710 of the CPL, formerly Titles II D and III of the Code of Criminal Procedure, are patterned upon the federal act, as they must be, since the latter is entitled to pre-eminence in authorizing and regulating the interception of wire and oral communications".

****

" The Congress has made it clear that Title III was carefully enacted to meet the objections which the United States Supreme Court had ununciated in Berger v. New York, 388, U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040, while striking down an earlier New York Statute. Title III was drafted to meet these standards and to conform with Katz v. United States 389, U.X. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)' (Senate Report No 1097, U.S. Code Cong. and Admin, News, 1968 p. 2153)

One of the objections set forth in the Berger opinion was that the earlier New York Statute required neither notice to those whose communications had been intercepted nor any showing of exigency which might excuse or postpone notice (Berger v. New York, supra, p. 60, 87 S. Ct. p. 1873). The Congress responded to that objection by enacting subsection (8) (d) of Section 2518 which requires that notice be given within a reasonable time but not later than 90 days after disapproval of an application for an order or termination "of the period authorized".

" Perhaps the question is made somewhat easier here since the Congress itself has written an evidentiary sanction into the statute by way of Section 2515, Title 18 U.S. Code, which provides:
'Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any Court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter [§ § 2510-2520 of this title] ' That the section is exclusionary is made plain by the explanation given in its legislative history:
' Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, officer, agency regulatory body, legislative committee or other authority of the United States, a State, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter. The

provisions must, of course, be read in light of section 2518 (10) (a), discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly or indirectly obtained in violation of the chapter. There is however, no intention to change the attenuation rule. Nor generally to press the scope of the suppression rle beyond present search and seizure law. But it does apply accross the board in both Federal and State proceedings. And it is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. The provisions thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications. (Senate Report No. 1097, U. S. Code Cong. and Admin. News, 1968, pp 2185. Citations omitted)".

Since the notice has not been served as required, it was not served in compliance with the statute, and thus requires suppression of each and every conversation of the petitioner that was intercepted.

It is respectfully submitted that service of a proper ninety day notice was a matter of substantial right designed to protect the petitioner from encroachment by the State upon his constitutional guaranteed rights of privacy by mandating that appropriate notice of recent eavesdropping be given to persons whose conversations are intercepted.

It would therefore follow that the Court erred in not suppressing the evidence obtained under the order of Mr. Justice Dubin and those which followed.

CONCLUSION

THE PETITION FOR CERTIORARI HEREIN SHOULD BE GRANTED

Dated: Brooklyn, New York
May, 1977

Respectfully submitted,

EVSEROFF & SONENSHINE

JEFFREY A. RABIN and
WILLIAM SONENSHINE,
Of Counsel

APPENDICES

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 738, 716—September Term, 1976.

(Argued February 8, 1977 Decided April 27, 1977.)

Docket Nos. 76-1506, 76-1512

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS FURY and JOHN QUINN,

Appellants.

Before:

FEINBERG, GURFEIN and MESKILL,

Circuit Judges.

Appeal from judgments of conviction in the District Court for the Eastern District of New York (Pratt, *D.J.*). Appellants pleaded guilty to the charge of conspiracy to transport stolen motor vehicles in interstate commerce after the District Court had denied their motions to suppress conversations intercepted in the course of New York State court-ordered wiretaps. The Court of Appeals held that appellants' claim that the wiretap order should have been suppressed because it was defective with respect to authorization, execution and post-intercept procedures was without merit.

Affirmed.

DAVID W. MCCARTHY, Mineola, N.Y. (McCarthy and Dorfman, Mineola, N.Y., of counsel), *for Appellant Fury.*

EVSEROFF & SONENSHINE, Brooklyn, N.Y. (William Sonenshine, Brooklyn, N.Y., of counsel), *for Appellant Quinn.*

ALVIN A. SCHALL, Assistant United States Attorney, Eastern District of New York (David G. Trager, United States Attorney, Eastern District of New York, of counsel), *for Appellee.*

GURFEIN, *Circuit Judge:*

John Quinn and Thomas Fury appeal from judgments of conviction in the United States District Court for the Eastern District of New York (Pratt, *D.J.*). They each pleaded guilty to the charge of conspiracy to transport stolen motor vehicles in interstate commerce in violation of 18 U.S.C. § 371 after the District Court denied their motions to suppress.[1] Both were sentenced to three years imprisonment. Quinn is free on bail pending appeal and Fury is serving a state sentence, upon the termination of which the federal sentence will begin.

The sole question on appeal is whether the District Court erred in denying the motions of appellants to suppress conversations intercepted in the course of a court-ordered wiretap on appellant Fury's telephone.[2]

1 A third defendant, Clark Johnston, also sought to suppress the wiretap evidence and pleaded guilty to the same charge, but he has not appealed from his judgment of conviction.

2 A defendant may appeal the denial of a suppression motion after he pleads guilty, where, as here, the government consents to this procedure at the time of the plea. *See United States* v. *Burke*, 517 F.2d 377 (2d Cir. 1975); *United States* v. *Faruolo*, 506 F.2d 490, 491 n.2 (2d Cir. 1974).

I

The facts do not appear to be in dispute. Pursuant to an investigation into auto thefts, the District Attorney's Office in Nassau County obtained from Justice Altimari, on March 15, 1974, an order for a wiretap for thirty days on the telephone of Myron Schnell in Commack, New York. No renewals or extensions were requested. The wiretap terminated on April 16 and Justice Altimari signed an order sealing the tapes of the intercepted conversation on May 1, 1974.

While the Schnell wiretap was in operation, conversations to which appellant Fury was a party were intercepted. Fury had not been named in the Schnell wiretap order. In July, 1974 he was notified in writing that his conversations had been intercepted during the Schnell tap.

In April, 1974, the Queens County District Attorney applied for a wiretap on Fury's telephone. In support of this application, the District Attorney submitted the affidavit of a New York City detective who had been investigating Fury and others with respect to the crimes of grand larceny and criminal possession of stolen property. Also supporting the wiretap application was the affidavit of a Nassau County detective. The detective interpreted certain conversations intercepted during the Schnell wiretap and to which Fury had been a party as indicating criminal activity. The transcripts were attached to the affidavit.

On April 26, 1974, a New York State Supreme Court Justice (Dubin, *J.*) granted the application and issued the order for a wiretap on Fury's telephone in Queens County. This time Fury was named in the order as a "target" of the tap.

Justice Dubin's order authorized a wiretap for thirty days. Two thirty-day extensions of this order were subsequently obtained and the wiretap ended on July 25, 1974. On July 31, 1974 Supreme Court Justice Leonard Fine issued an order sealing the tapes of the intercepted conversations.

Both Quinn and Fury were overheard during the Fury wiretap. Fury was served with notice of the tap on April 1, 1975 after Justice Dubin had twice postponed the service of notice upon application of the District Attorney. Quinn was never formally notified under the New York statute that his conversations had been intercepted during the Fury wiretap. He was so notified, however, on February 20, 1976, by the United States Attorney's Office through his attorney.

II

Appellants contend that the seizure of Fury's conversations obtained pursuant to the "Schnell order" was illegal, requiring their suppression as well as the suppression of "evidence derived therefrom." With respect to the Schnell tap, they argue: (1) that there was a failure by the monitoring officers during the Schnell wiretap to "minimize" the interception of non-pertinent conversations; (2) that Assistant District Attorney Edward Margolin was not a proper "applicant" under the statute to apply for the wiretap warrant; (3) that the recordings of conversations seized during the wiretap were not timely sealed; and (4) that appellant Fury was not timely served with notice of the wiretap.

Having thus claimed that the Schnell order was invalidly issued and improperly executed, appellants contend that the Fury wiretap, which, as noted, was obtained in part on the basis of conversations intercepted during the Schnell wiretap, should have been suppressed as "fruit of the poisonous tree." *See Wong Sun* v. *United States*, 371 U.S.

471, 487-88 (1963). The Fury wiretap is attacked directly, moreover, upon the following grounds: (1) that it was not established that normal investigative techniques had been tried and failed; (2) that the two extension orders were not supported by "present probable cause"; and (3) that there was untimely sealing and service of notice of the tapes of conversations intercepted during the Fury wiretap.

III

A. *Standing*

We agree with the government's contention that Quinn has no standing to challenge the Schnell wiretap. Under both New York State and federal law only an "aggrieved person" has standing to challenge the validity of a wiretap.[3] New York Criminal Procedure Law ("CPL") § 710.20; 18 U.S.C. § 2518(10)(a). An aggrieved person is one who has had his conversations intercepted during the wiretap, or is a person against whom the wiretap was directed. CPL § 710.10(5); 18 U.S.C. § 2510(11).

Quinn was not named in the Schnell wiretap order and he was not a party to any conversation intercepted during that tap. Since he is not an "aggrieved person," he cannot challenge the Schnell tap directly by seeking to suppress information derived from it. In consequence, he cannot challenge it indirectly by seeking to suppress evidence from the Fury tap on the ground that the Fury tap was authorized in part on the basis of information from the Schnell

3 The warrants in this case were issued and executed under the New York Eavesdropping statute, CPL § 700.05, *et seq.* Therefore, their validity must in the first instance, be determined by New York law. *United States* v. *Rizzo*, 491 F.2d 215, 217 (2d Cir.), *cert. denied*, 416 U.S. 990 (1973). However, the New York statute is patterned after the federal wiretap statute, 18 U.S.C. § 2510, *et seq.* *People* v. *Sher*, 38 N.Y.2d 600, 604 (1976). *See United States* v. *Principie*, 531 F.2d 1132, 1140 n.11 (2d Cir. 1976). *But cf., United States* v. *Manfredi*, 488 F.2d 588, 598 n.7 (2d Cir. 1973).

tap. *Wong Sun* v. *United States*, 371 U.S. 471, 491-92 (1963); *United States* v. *Wright*, 524 F.2d 1100, 1102 (2d Cir. 1975). *See United States* v. *Tortorello*, 533 F.2d 809, 815 (2d Cir. 1976). But, of course, Quinn has standing to challenge the Fury tap on grounds unrelated to the Schnell tap, since his conversations were overheard during that later tap.

Fury, on the other hand, has standing as an aggrieved person to challenge both the Schnell and Fury wiretaps. *See* New York Civil Practice Law and Rules ("CPLR") § 4506(2). Fury does not have standing, however, to raise the issue of improper "minimization" during the Schnell tap. That is because the tap on Schnell's phone and the failure to minimize the conversations intercepted is an invasion of Schnell's privacy, not Fury's. *United States* v. *Poeta*, 455 F.2d 117, 122 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972); *People* v. *Fiorillo*, 63 Misc. 2d 480, 481 (Montgomery Cty. Ct. 1970). *See Alderman* v. *United States*, 394 U.S. 165, 171-76 (1969); *United States* v. *Hinton*, 543 F.2d 1002, 1011, n.13 (2d Cir. 1976).

Consequently, since neither Quinn nor Fury has standing to raise any claim of failure to minimize the Schnell tap interceptions, we shall not address that contention further.

B. *Authority to Seek Eavesdropping Order*

Fury's second challenge to the Schnell wiretap order is directed to the application made by the Office of the Nassau County District Attorney. He contends that Edward Margolin, then the Chief Assistant District Attorney, was not a proper "applicant" for an eavesdropping warrant within the meaning of the New York Criminal Procedure Law.

Subdivision 2(a) of CPL § 700.20 states that the application for an eavesdropping warrant must set forth the

identity of the "applicant", and must contain a statement of the applicant's authority to make the application. "Applicant" is defined in subdivision 5 of CPL § 700.05 in pertinent part as a "district attorney" or if the district attorney is "actually absent or disabled . . . that person designated to act for him and perform his official function in and during his actual absence or disability."

In the Schnell wiretap application Margolin stated that he was the Acting District Attorney of Nassau County, that the District Attorney was out of the State, and that he was proceeding under the authority of § 702 of the New York County Law (McKinney 1972). At this time there was on file in the County Clerk's Office a memorandum dated June 10, 1974 and signed by the District Attorney which designated, "in order of succession," Margolin and another Assistant District Attorney as "duly authorized deputies or emergency interim successors for the office of DISTRICT ATTORNEY." The designation was made pursuant to § 2216(3) of the County Government Law of Nassau County (Cum. Supp. 1976) providing for the continuity of government in the event of an enemy attack or public disaster. The memorandum indicated it had also been sent to the County Executive and County Comptroller.

Another memorandum, dated April 9, 1971, and addressed to the County Executive, again designated Margolin the "Chief Assistant District Attorney," and two other Assistant District Attorneys as "Acting District Attorneys" and "duly authorized deputies or emergency interim successors." The designation was again made pursuant to § 2216 of the County Government Law of Nassau County (Cum. Supp. 1976).

Fury claims that Margolin was not a proper "applicant" under CPL § 700.05(5) because these designations did not comply with the requirements of § 702 of the New York County Law. Subdivision 4 of § 702 requires the District

Attorney to "designate in writing and file in the office of the county clerk and clerk of the board of supervisors the order in which such assistant [district attorneys] shall exercise the powers and duties of the office in the event of a vacancy or the absence or inability of such district attorney to perform the duties of the office." The designations in the above memoranda were deficient, according to Fury, because they only mentioned "enemy attack" or "public disaster" and did not specifically state in so many words that the order of succession also applied when the District Attorney "is actually absent or disabled." He notes, moreover, that the second memorandum was not filed with the County Clerk and the Clerk of the Board of Supervisors pursuant to § 702.

Judge Pratt found that the designations in these memoranda were in substantial compliance with the requirements of § 702, but held that even if they were not, they constituted a proper designation under CPL § 700.05. We agree.

It is clear that Margolin was "the person designated to act for [the District Attorney] . . . in and during his actual absence," whether or not there was literal or substantial compliance with § 702 of the New York County Law. There is no reason to assume that the only way to comply with § 700.05 is through adherence to the particular requirements of § 702, though we do not doubt that it is useful for the District Attorney to comply. The purpose of the designation provision in § 700.05 is to make sure that the person who does apply for such an order has the authority to make that application, and, as the District Court found, Margolin had that authority. *Cf. United States* v. *Chavez*, 416 U.S. 562, 571-73 (1974).[4]

4 Fury also contends that CPL § 700.05 conflicts with 18 U.S.C.§ 2516(2) in that the New York statute impermissibly permits delegation of the authority to seek eavesdropping orders to a subordinate in the absence

C. *Notification of the Wiretaps*

Appellants claim that both wiretaps are "unlawful" and should be suppressed because notification was not made pursuant to CPL § 700.50(3) which requires that within ninety days after the termination of an eavesdropping warrant, notice of the wiretap must be served on the person named in the warrant and such other parties to the intercepted conversation "as the justice may determine in his

or disability of the district attorney. He claims that Congress did not contemplate that any person other than the attorney general or county district attorney himself would have such authority. As one court which rejected this argument stated, "Congress simply could not have intended that local wiretap activity would be completely suspended during the absence or disability of the official specifically named [in § 2516(2)]." *State* v. *Travis*, 308 A.2d 78, 82, 125 N.J. Super. 1 (1973), *aff'd*, 336 A.2d 489, 133 N.J. Super. 326 (1975).

This conclusion is supported by the legislative history. The Senate Report states that "the issue of delegation by [the Attorney General or District Attorney] would be a question of state law." S. Rep. No. 1097, 90th Cong. 2d Sess. (1968), 1968 U.S. Code Admin. News 2112, 2187. Fury responds that the statement, also in the Senate Report, that "[t]he proposed provision does not envision a further breakdown" past the Attorney General or District Attorney precludes the delegation in the New York law. However, the delegation in New York is to an "acting" district attorney. This is not a "further breakdown" in the chain of command. There is still only one person who has the authority and he is at the top.

At least one New York court has upheld the New York provision against the same argument advanced by Fury. *People* v. *Fusco*, 75 Misc. 2d 981 (Nassau Cty. Ct. 1973). We agree that the New York provision comports with the federal wiretap law. The delegation is only made to assure that someone can make the application and it does not change the fact that, like the federal law, the New York law "centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques," 1968 U.S. Code & Admin. News, *supra* at 2185. In this case the District Attorney is responsible for and names his replacement when he is absent. And "should abuses occur, the lines of authority lead to an identifiable person," *id.*, the acting district attorney.

In any case, Fury is barred from asserting this claim now because he failed to assert it in the pre-trial suppression hearing. *See United States* v. *Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976); 18 U.S.C. § 2518(10).

discretion is in the interest of justice." This section is patterned after 18 U.S.C. § 2518(8)(d).[5]

Fury, as to the Schnell wiretap, and Quinn, as to the Fury wiretap, are only entitled to "discretionary" notice because they were not named in the respective orders. On the other hand, Fury was named in the Fury order and he is, therefore, entitled to the ninety-day mandatory notice. So far as the Schnell wiretap is concerned, the failure to notify Fury, who was not named in the order, in timely fashion does not require suppression. *United States* v. *Donovan*, —— U.S. ——, 45 U.S.L.W. 4115 (Jan. 18, 1977). The same is true with regard to the failure to notify Quinn of the Fury wiretap. And with regard to the Fury wiretap, where Fury was *named*, and

5 Criminal Procedure Law § 700.50(3) states:

"Within a reasonable time, but in no case later than ninety days after termination of an eavesdropping warrant, or expiration of an extension order, except as otherwise provided in subdivision four, written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping, and of the fact that during such period, communications were or were not intercepted, must be personally served upon the person named in the warrant and such other parties to the intercepted communications as the justice may determine in his discretion is in the interest of justice."

Title 18 U.S.C. § 2518(8)(d) states:

"Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extension thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, as inventory which shall include notice of:

"(1) the fact of the entry of the order or the application;

"(2) the date of the entry and the period of authorized approved or disapproved interception, or the denial of the application;

"(3) the fact that during the period wire or oral communications were or were not intercepted."

hence entitled to notice within ninety days of "the termination of the period of an order or extensions thereof," the law in this circuit, as appellants concede, is that failure to give the proper notification will result in suppression of the wiretap evidence only where prejudice is shown, even when notice is "mandatory" under 18 U.S.C. § 2518(8)(d). *United States* v. *Principie,* 531 F.2d 1132, 1141 (2d Cir. 1976) (named defendant); *United States* v. *Rizzo,* 492 F.2d 443, 447 (2d Cir.), *cert. denied,* 417 U.S. 944 (1974) (named defendant). *Principie* was decided after *United States* v. *Giordano,* 416 U.S. 505 (1974) and *United States* v. *Chavez,* 416 U.S. 562 (1974), which held that the Attorney General himself or an Assistant Attorney General had to authorize a wiretap, and that suppression was required in default thereof. We adhered to our prior holding in *Rizzo,* but we wondered whether the grant of certiorari in *United States* v. *Donovan,* 513 F.2d 337 (6th Cir. 1975), would affect the issue of whether proof of prejudice was relevant.

The decision of the Supreme Court in *Donovan* has not given us an altogether clear answer, however. That case involved the failure to give notice to two persons whose conversations had been overheard but who had not been "named" in the order. In such case, it is discretionary with the judge whether to give them notice. 18 U.S.C. § 2518(8)(d). The Court of Appeals ordered suppression of the conversations based upon its reading of *Giordano, supra.* There, as we have noted, the Court decided that authorization by the Attorney General or an Assistant Attorney was essential, on the ground that, based upon the legislative history, such authorization played "a central role in the statutory scheme." 416 U.S. at 528. In *Donovan,* the Court surveyed the structure of the Act and its legislative history and concluded that "we do not think that postintercept notice was intended to serve as

an independent restraint on resort to the wiretap procedure." *United States* v. *Donovan,* —— U.S. ——, 45 U.S.L.W. at 4122. We must acknowledge that the actual holding of *Donovan* relates to the class of persons required to be given "discretionary notice" pursuant to 18 U.S.C. § 2518(8)(d), but we think that the reasoning of the Court confirms the view which we expressed in *Rizzo* and *Principie, supra,* that prejudice must also be shown when the notice is said to be "mandatory" within the ninety-day period in the same subsection of the Statute. In sum, while it is desirable for the prosecutors to meet the ninety-day notice requirement, we again hold that a failure strictly to observe the time limitation puts the burden on the defendant to show that he was prejudiced. *See Donovan, supra,* —— U.S. ——, 45 U.S.L.W. at 4122 n.26.

Here Fury received the mandatory notification of the tap on his phone in April, 1975 after two orders were issued by Justice Dubin extending the time for notification. He was notified officially fifteen months before the suppression hearing, and he has not shown prejudice. We need not reach the question, therefore, whether the orders postponing the notice were valid, which, in any event, would make the notice timely.

D. *"Normal investigative techniques" requirement*

Appellants also contend that the Fury eavesdropping order was improperly issued because the supporting affidavit of Detective Gonzalez did not comply with the requirements of subdivision 2(d) of CPL § 700.20.[6]

---

6 That subdivision provides that an application for an eavesdropping warrant must contain:

"A full and complete statement of facts establishing that normal investigative procedures have been tried and have failed or rea-

The Gonzalez affidavit contained the following statement:

> "Normal investigative techniques have been attempted in this case. Investigation herein commenced on April 2, 1974 and investigation was conducted on April 3, 4, 5, 9, 10, 11, 15, 16, 17, 19, 22, 23 and 24th. It is very difficult to 'tail' the persons named herein because they are very careful and are constantly changing routes and acting in such a way as to locate surveillance vehicles. We have been able to ascertain that Thomas Fury goes often to an auto parts yard at E. 56th Street and Avenue D in Brooklyn, known as Bergen Auto Parts. This is a fenced in yard wherein the trailer that the 'Goldbug' was placed is located. The 'Goldbug' was an eavesdropping device placed by the Kings County District Attorney's Office Squad which allegedly obtained substantial information about criminal activities of Paul Vario and his associates. Therefore, the persons around this auto parts yard are very careful and very sensitive to Police surveillance."

The District Court determined that the affidavit met the statutory requirements. It noted that the New York court

sonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence sought . . . ."

The corresponding federal provision is 18 U.S.C. § 2518(1)(c):

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

• • •

"(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried to be too dangerous;"

could have reasonably determined that the individuals being investigated were acting cautiously, were sensitive to the potential of a police investigation and that the full scope of the criminal conspiracy, if it existed, could not be determined except by means of electronic surveillance. It also noted that this was a situation where the whole investigation might be aborted if the suspects were tipped that such an investigation was being conducted.

At the outset we note that the purpose of these "other investigative techniques" requirements "is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques." *United States* v. *Pacheco*, 489 F.2d 554, 565 (5th Cir.), *cert. denied*, 421 U.S. 909 (1974); *People* v. *Holder*, 69 Misc. 2d 863, 868 (Sup. Ct. Nassau Cty. 1972). Moreover, the required showing is to "be tested in a practical and commonsense fashion." 1968 U.S. Code & Admin. News, *supra*, at 2190. In short, the requirement is "simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153 n.12 (1974).[7]

The detective's affidavit stated that normal investigative techniques were attempted on thirteen specific dates, that the subjects were "difficult to 'tail'" because they were "very careful and . . . constantly changing routes." The affidavit also noted that Fury often went to a location that had been previously "bugged" successfully and that, as a result, the subjects were especially sensitive to police sur-

7 And the more traditional surveillance techniques need not be exhausted first if they are "impractical" or "costly and inconvenient." *United States* v. *Robinson*, 504 F.2d 289, 293 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975) (undercover agents).

veillance. We think these statements amply met the state's burden under CPL § 700.20(2)(d). *See United States* v. *Steinberg*, 525 F.2d 1126, 1130 (2d Cir. 1975).[8]

E. *"Present probable cause" for the extension order of the Fury wiretap*

Appellants claim that there was no "present probable cause" for the renewal order of the Fury tap as required by *Berger* v. *New York*, 388 U.S. 41, 59 (1967). *See People* v. *Gnozzo*, 31 N.Y.2d 134, 141 (1972). Specifically, they argue that the transcripts of the conversations already intercepted during the Fury tap revealed only innocuous, or, at best, ambiguous conversations between Fury and his associates.

CPL §§ 700.15(3), 700.20(2)(e) and 18 U.S.C. § 2518(1)(d) and (3)(b) provide that a wiretap may issue only upon a showing of probable cause to believe that communications pertaining to the designated offense will be obtained through the wiretap. Moreover, there must be probable cause that an offense has been or is about to be committed. CPL §§ 700.15(2), 700.20(2)(b)(i); 18 U.S.C. § 2518(1)(b)(i) and (3)(a). This standard of probable cause is the same as the standard for a regular search warrant. *United States* v. *Falcone*, 505 F.2d 478, 481 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975); *People* v. *Kaiser*, 21 N.Y.2d 86 (1967), *aff'd sub nom. Kaiser* v. *New York*, 394 U.S. 280 (1969); *People* v. *Fusco*, 75 Misc. 2d 981 (Nassau Cty. Ct. 1973).

Detective Gonzalez' affidavit interpreted the transcripts of the eight conversations previously intercepted during the Fury tap. He concluded that they all indicated dis-

8 We consider appellants' claim that the "other investigative techniques" requirement was not met in the two applications for extensions of the Fury tap also to be without merit.

cussion of stolen property.[9] The conversations, while somewhat ambiguous at times, can be reasonably interpreted to indicate what the detective interpreted them to be. Fury's interpretations, on the other hand, are somewhat ludicrous. For instance, Detective Gonzalez interpreted the following conversation to refer to license plates to transport stolen vehicles:

> "Fury: I need the plates.
> "Joey: When?
> "Fury: Right now.
> "Joey: Come and get them."

Fury contends that the "reference could very simply have been dinner plates." He also contends that the following statements about "Sonny" who had been arrested for possession of a stolen truck were exculpatory:

> "Fury: Oh, that kid is bad, boy.
> "John: I don't know what the hell he is doing, *you gotget* [sic] *permission when you take a truck or car, anything.*
> "Fury: You better believe it."

(Emphasis added.)

9 The affidavit interprets the eight conversations as follows:

"In the first conversation there is a discussion of needing plates which I interpret as needing license plates to transport stolen vehicles. In the second conversation there is discussion relative to one of the persons nicknamed "Sonny" being arrested for possession of stolen truck. In the third conversation, two individuals discuss stolen goods. The fourth conversation regards obtaining clean registrations for stolen vehicles. The fifth conversation represents possession of stolen property. The sixth conversation is a cryptic conversation regarding setting up a meeting. The seventh conversation represents selling of stolen merchandise. The eighth conversation represents possession of stolen stereos. In my experience, as a Police Officer each of these conversations represents the discussion of stolen property."

Moreover, when the eight conversations are considered in the context of Fury's criminal record, what the investigation had already disclosed (as set forth in the initial affidavit seeking the order), and the conversations obtained under the Schnell wiretap, there is ample demonstration of probable cause.

Appellants' claim is therefore without merit.

F. *Sealing of the Schnell Tapes*

The most troublesome claims raised by appellants are the last two which relate to the sealing of the Schnell and Fury tapes. Fury contends that the fourteen-day delay in sealing the Schnell tapes rendered the wiretap "illegal" and thus also made the Fury tap illegal because it was obtained "through the exploitation of the original illegality." He claims that the tapes of both wiretaps, therefore, must be suppressed.

The government concedes both that there is no explanation for the fourteen-day delay and that under the appropriate case law, *see United States* v. *Gigante*, 538 F.2d 502 (2d Cir. 1976), the Schnell tapes would be suppressed from use *at trial or in a grand jury proceeding.* However, it argues, and the District Court agreed, that the tapes may be used to establish *probable cause* for the wiretap order on the Fury telephone.

Subdivision two of CPL § 700.50 requires that "[i]mmediately upon the expiration of the period of an eavesdropping warrant, the recordings of communications . . . must be made available to the issuing justice and sealed under his directions." The government, of course, fully recognizes the State's obligations under this section. The conversations in the Schnell wiretap, if offered as evidence, could have been suppressed under *Gigante*, *supra*. But here there was no attempt to offer the tapes in evidence.

They were "used only in the establishment of probable cause" for another wiretap. The government contends that a failure to seal under § 700.50 does not bar disclosure of the contents of the wiretap tapes when the disclosure is for investigative purposes or to establish probable cause for additional warrants.[10] The only limitation on use, it contends, is set out in subdivision three of CPL § 700.65, use or disclosure of the tapes before a grand jury or at trial. It argues, in support of such statutory construction that, otherwise, police officers operating an on-going wiretap would be unable to use the fruits of that tap simply because the tap had not yet ended and the tapes had not yet been sealed.

The government also relies on the legislative history of the federal provisions after which the three subdivisions

---

10 This argument is based on the differing language in the first three subdivisions of CPL § 700.65. They state:

> "1. Any law enforcement officer who, by any means authorized by this article, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom, may disclose such contents to another law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> "2. Any law enforcement officer who, by any means authorized by this article, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom, may use such contents to the extent such use is appropriate to the proper performance of his official duties.
>
> "3. Any person who has received, by any means authorized by this article, any information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this article, may disclose the contents of that communication or such derivative evidence while giving testimony under oath in any criminal proceeding in any court or in any grand jury proceeding; *provided, however, that the presence of the seal provided for by subdivision two of section 700.50, or a satisfactory explanation of the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any communication or evidence derived therefrom.*"

(Emphasis added.) The government notes that only subdivision 3 requires a seal.

of the New York statute are modeled,[11] and a District of Columbia Circuit opinion which deals with an analogous provision in the federal statute.[12]

While the question is not free from doubt, we are persuaded that the view pressed by the government, and accepted by the District Court, is sound. The Schnell tapes, even with the fourteen-day unexplained delay in sealing, provide a proper basis for a finding of probable cause to support the issuance of the Fury wiretap order, even though the Schnell tapes might not have been admissible in evidence.

We note, in any event, that though in *Giordano, supra,* a tape derived from a prior unauthorized tape was suppressed, this was in the context of the authorization deemed to be central to the statutory scheme. *Giordano* did not

11 The Senate Report states as to 18 U.S.C. § 2517(2), the counterpart of CPL § 700.65[2], that the "proposed provision envisions use of the contents of intercepted communications, for example, to establish probable cause for arrest . . . [and] probable cause to search . . . ." 1968 U.S. Code & Admin. News 2122, 2188. And it states that a seal is "intended to be a prerequisite for use or disclosure under section 2517(3) (at trial or grand jury proceeding—the counterpart of CPL § 700.65[3], *id.*, at 2194, but does not mention the seal requirement with regard to the first two subdivisions (disclosure to other investigative or law enforcement officer and use in performance of one's duties).

12 *See United States* v. *Johnson*, 539 F.2d 181 (D.C. Cir. 1976). The court noted that 18 U.S.C. § 2517(5) requires prior judicial approval for use of other-crimes fruits of a wiretap, only where the information is to be offered in testimony at a federal or state proceeding. The court concluded:

> "Prior application and approval for this type of use is desirable in order to assure that rights will not be affected by information obtained in violation of the Fourth Amendment or the wiretap statute. The writers of the statute have apparently concluded that the balance of police efficiency with the need for safeguarding personal privacy calls for exclusion of the fruits or illegal seizures from admission at trial, but does not demand routine judicial review prior to that time, at every stage of an investigation."

Id., at 539 F.2d at 187.

deal wih postintercept requirements, nor did *Gigante, supra,* deal with the derivative, as distinguished from testimonial, use of tapes which had not been timely sealed.

G. *Sealing of the Fury Tapes*

Also troublesome is appellants' argument that the Fury tapes were not timely sealed and must therefore be suppressed. Central to this claim is the argument that the sealing provision of the New York statute, CPL § 700.50(2), requires that, if there is an extension of the original order, the tapes must be sealed after each thirty-day period and not after the termination of the final extension of the original wiretap order. In this case that would mean that the Fury tapes would have had to be sealed upon completion of *each* of the three thirty-day periods of the wiretap which resulted from the two extension orders. Since they were not sealed until six days after the termination of the third period, appellants argue that there were sealing delays ranging from six to sixty-three days.

The pertinent language requiring sealing is contained in CPL § 770.50(2) and 18 U.S.C. § 2518(8)(a). CPL § 700.50(2) requires sealing "[i]mmediately upon the expiration of the period of an eavesdropping warrant," and 18 U.S.C. § 2518(8)(a) "[i]mmediately upon the expiration of the period of the order, or extensions thereof." The appellants claim that the strict construction mandated by the case law of the sealing provision supports their interpretation. The government responds that this interpretation is contrary to both a plain reading of the statute and basic common sense. It notes, for instance, that the statutes use the phrase "the period" rather than "a period" or "each period" and that this clearly shows an intent to treat an eavesdropping order, together with its

extensions, as one continuing period for the purposes of the sealing requirement.

There is really no precedent and nothing in the legislative history of either statute that directly supports appellants' claim. There is, of course, some logic in the proposition that the purpose of the sealing provisions would be better served if the tapes were sealed every thirty days rather than at the end of ninety days. Carried to its ultimate conclusion, however, tampering with the tapes could only be guarded against if they were sealed by a judge at the end of each day. The statute does not require this. Whatever tampering could be done in ninety days could be done in thirty days. As a practical matter, sealing every thirty days would not be a significantly better safeguard than the system used by the Queens District Attorney. In *Gigante, supra,* we were dealing with separate orders by different judges. Here the back-to-back extensions simply continued the *same* wiretap on the same telephone under the *same* warrant. The Fury wiretaps were conducted under a single warrant that was extended by court order.

The intended congruity of the state and the federal statutes is apparent. And we read the New York statute, as we do the federal statute, to make a single "period" "of the period of the order, or extensions thereof," provided that they are consecutive. Any other interpretation would require, in our view, either clearer Congressional language or some more cogent reason of policy than has been presented or that occurs to us. The only apparent authority in point supports the position of the government. *See People* v. *Mangiaracina,* Indictment No. 5161/73 (Sup. Ct. Kings Cty. July 15, 1976).

Since the language of the statutes, the apparently prevailing practice, and what case law there is, supports the position that the government need seal the tapes only after

the termination of the extensions of the original order, that is the position we adopt. We note, however, that since it would not be a hardship for the government to seal the tapes after each thirty-day period, it might seriously consider adopting such a practice.

This leaves only the question of the six-day delay in sealing the tapes from the end of the final extension. The reason given for the delay is that the State was attempting to have the "issuing justice," as required by CPL § 700.50, seal the tapes. When the District Attorney's Office found out that the Justice was on vacation, they immediately sought another Supreme Court Justice and the tapes were sealed.

We have held that when there is a reasonable basis for the delay, the failure to file an inventory and to seal "immediately" does not compel suppression. *United States* v. *Poeta,* 455 F.2d 117 (2d Cir.), *cert. denied,* 406 U.S. 948 (1972); *United States* v. *Capra,* 501 F.2d 267, 277 n.10 (2d Cir. 1974), *cert. denied,* 420 U.S. 990 (1975). *See Gigante, supra,* 538 F.2d at 506 n.8; *People* v. *Carter,* 81 Misc. 2d 345 (Cty. Ct. Nassau Cty. 1975); *People* v. *Blanda,* 80 Misc. 2d 79 (Sup. Ct. Monroe Cty. 1974); *People* v. *Simmons,* 84 Misc. 2d 749 (Sup. Ct. N.Y. Cty. 1975).

We think the District Court was correct in its determination that there was a reasonable basis for delay.

Since we find all of appellants' contentions to be without merit, the judgments of conviction are affirmed.

APPENDIX "B"

"Section 700.50 Eavesdropping Warrants; Progress Reports and Notice.

******

(2) Immediately upon the expiration of the period of an eavesdropping warrant, the recordings of communciations made pursuant to subdivision three of section 700.35 must be made available to the issuing justice and sealed under his directions.

(3) Within a reasonable time, but in no case later than 90 days after termination of an eavesdropping warrant, or expiration of an extension order, except as otherwise provided in subdivision four, written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping, and of the fact that during such period communications were or were not intercepted, must be personally served upon the person named in the warrant and such other parties to the intercepted communications as the justice may determine in his discretion is in the interest of justice. The justice, upon the filing of a motion by any person served with such notice, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communciations, applications and warrants as the justice determines to be in the interest of justice."

****

"Section 700.65: Eavesdropping warrants: Disclosure and Use of Information: Order of Amendment.

(1) Any law enforcement officer who, by any means authorized by this article, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom, may disclose such contents to another law enforcement officer to the extent that such disclosure is appropriate to the

proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any law enforcement officer who, by any means authorized by this article, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this article, any information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this article, may disclose the contents of that communication or such derivative evidence while giving testimony under oath in any criminal proceeding in any court or in any grand jury proceeding; provided however, that the presence of the seal provided for by subdivision two of section 700.50, or a satisfactory explanation of the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any communication or evidence derived therefrom.

(4) When a law enforcement officer, while engaged in intercepting communications in the manner authorized by this article, intercepts a communication which was not otherwise sought and which constitutes evidence of any crime that has been, is being or is about to be committed, the contents of such communications, and evidence derived therefrom, may be disclosed or used as provided in subdivisions one and two. Such contents and any evidence derived therefrom may be used under subdivision three when a justice amends the eavesdropping warrant to include such contents. The application for such amendment must be made by the applicant as soon as practicable. If the justice finds that

such contents were otherwise intercepted in accordance with the provisions of this article, he may grant the application."

Constitution of the U. S.

Amendment [IV]

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affiramtion, and particularly describing the place to be searched and the persons or things to be seized.

Constitution of the U. S.

Amendment [XIV]

***No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ***

Article 1 §6

***No person shall be deprived of life, liberty or property without due process of law. ***

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for the use or disclosure pursuant to the provisions of subsection (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517. *******

(10)(a) Any aggrieved person in any trial, or proceeding in or before any court, department, officer agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that -

(i) the communcation was unlawfully intercepted;

(ii) the order of authorization or approval

under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order authoriziation or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

APPENDIX "C"

Motions have been made by all defendants to suppress use of the Queens County Wire Taps and all evidence derived therefrom, and to also suppress the fruits of the Nassau County Wire Tap, which have been described in the papers and in testimony submitted to the Court. The motions are made on numerous grounds and I believe the best way to dispose of them is to take the grounds, more or less, in the order presented by the moving papers of Mr. McCarthy.

In the preliminary matter, the Court finds that neither defendants Quinn nor defendant Johnston has any standing to challenge the Nassau County Wire Taps.

With respect to the challenge by defendant Fury, to the Nassau Wire Taps, first as to the claim that the applicant was not designated in accordance with the requirements of the statute Section 700.50,Subdivision 5, I believe it is of the New York Criminal Procedure Law. The Court finds based upon the evidence presented that Edward Margolin was in fact the person who was authorized to act in the absence of the Nassau County District Attorney, William Kahn.

This finding distinguishes the case from the Giordano case where the individual applied for the wire tap was not one of those contemplated by the statute as being a proper applicant.

With respect to the Nassau County Taps, I find that the only person who could have acted in the absence of Mr. Kahn or the first person who could have acted in place of Mr. Kahn, was Mr. Margolis who would make the application. He was

authorized to do so as it appears from his own affidavit. Evidence of his position as first in command in the Nassau County District Attorney's office is corroborated by the designation of the succession of Government, which has been presented to the Court.

I find that the designation filed under the succession of Government acts, in accordance with the Nassau County Government Law, that this particular instrument is substantial compliance with the designation requirement of Section 702 of the County Government Law, but even if it were not, I have concluded that the designation was in fact made and that the failure that exists and I have considerable doubt as to that as well, since the only evidence presented to me is a hearsay statement of an attorney, based upon the statement of the attorney's investigator who says that he spoke with some one or worked with some one in the Nassau County Clerk's Office and didn't find the instrument in question, but even assuming the instrument was not filed, I conclude that the failure to file under the circumstances here is not fatal for the purposes of suppressing the Nassau County Wire Taps, particularly at this point in time. Years -- after the fact.

With respect to the sealing of the Nassau County WireTaps, both the New York State Court of Appeals and the Second Circuit, the latter, U.S. against Gigante have indicated that an unexplained failure to unexplained dealy in sealing does require suppression. In this case, there is no explanation presently before the Court as to why there was a delay I believe of 13 or 14 days in sealing the Nassau County Wire Taps.

However, in view of the provisions, of Criminal

Procedure Law, Section 700.65, Subdivisions 1 and 2, I find that under the -- for the purpose for which these wire taps were used, those sections authorized and contemplate that without regard to the sealing requirement. The sealing requirement is referred to in Section 700.65 only in Subdivision 3 and I have concluded that the purpose for which they were used here is not, does not fall within the meaning of that subdivision. Consequently, the delay in the sealing here is not the basis for the suppressing of the Nassau County Wire Taps, which are now intended to be used as evidence in this case.

The next contention raised was suppression should be granted of Mr. Fury because he was not provided the 90 statutory days notice of the Nassau County Wire Tap. I find, first, that there is no requirement that he be served with a notice. It is not one of those contemplated by the statute as being entitled, mandatorily, to a notice. In fact, Mr. Fury was served some 21 days after it, some eight days, I believe it was, after the expiration of the period, assuming the period might have been applicable to him, but he was served in 1974.

Even if he were entitled to have been served, he could not succeed in his claim for suppression without establishing the touch stone of the right to relief.

This ground of failure to receive notices is one of prejudice. No claim of prejudice in the present proceedings has been raised by Mr. Fury and none appears would be, with the possible exception of a reference to an affidavit to a guilty plea which Mr. Fury made in another case which he indicates he would not have made, which Mr. McCarthy indicated that he would not have made had he known of the wiretaps.

If, in the way, in which this case develops, it is the defendant jury's belief that the use of that guilty plea would in any way prejudice his interests here my ruling that he is not entitled to suppression of the wire taps, is without prejudice to Mr. Fury's right to seek suppression of that conviction, if he decides to testify in the action or if under any circumstances, the government should attempt to make use of that conviction.

With respect to the argument that in the Nassau County Wire Tap Order there was a failure to indicate the agency to conduct the tap, I find that Mr. Medonia, who is apparently the active police officer in administrating the tap, was in fact working under the supervision of the District Attorney's Office, notwithstanding the fact that the police officer was in the auto squad of the Nassau County Police Department. It is clear to the Court that the Nassau County Tap was sought by the Nassau County District Attorney's Office. It was the agency which made the application. It was the agency authorized to make the tap and that the action taken by Mr. Medonia and his associates, in executing the tap, were all under the supervision of the District Attorney's Office within the realm of the statute.

With respect to the argument that the Nassau County Order was not amended in order to include the name of Mr. Fury, after it was first mentioned in the course of one of the intercepted conversations, the defendant -- Fury, is quite correct in his assertion that the Order was not amended but I find that there was no requirement for amendment in this instance. The amendment portion of the statute focuses upon the transactions, the crimes which are involved. It is not directed at the names of individuals.

One of the purposes, of the Wire Taps Statute is to authorize the gathering of information of criminal activities, particularly with respect to additional people who may be engaged in criminal activities, which are under investigation. While the statute does require amendment if additional crimes, beyond the scope of the original authorizing order, are uncovered, it does not in terms of reasonable implication, require amendments when the names of additional people, other than those named in the Order itself are discovered.

Turning to the Queens Wire Taps the first argument advanced, of course, is that the Queens Tap is the fruit of a poison tree. In the determination of that, the tree however was not poisoned, I therefore -- there is nothing in the Nassau County Taps which in any way taint the Queens County Taps. The Queens County Taps can be measured on its own merit.

The first argument advanced under the Queens County Taps were lack of probable cause in the application for the original order. I have reviewed the application, the supporting affidavit, and it is my determination that there was probable cause for the Supreme Court Justice in Queens County to grant the Wire Tap, based upon the information which was then before him.

One of the arguments advanced by defendant Fury was that the interpretation made of the Nassau County Taps was an interpretation of innocuous phone calls. This argument was also advanced in connection with the application for extentions of the Queens County order. With respect to that argument, all the Court has been offered is abstract of the taps in question; the inter-

pretations by the police officers who have studied the abstracts or heard the conversations themselves. The interpretations which they have offered appear to the Court to be reasonable interpretations of what is reported in the Taps. They are by no means crystal clear. Perhaps they are ambiguous. They are certainly not innocuous, but I have been given no alternative interpretation of those Taps but Mr. Fury, who was one of the participants in the conversations or by anyone else and I cannot find, on the basis of what is before me, that the determinations by the Supreme Court Queens County Justice, either on the initial issuance or on the renewals of the Orders extensions of the Orders, I cannt find that this determination of probable cause is an improper one.

With respect to the claim that there is an insufficient demonstration of having attempted or considered other possible investigative procedures as an alternative to the Wire Tapping, I find the records before the Court, with respect to the initial request and the two extensions, there was a sufficient demonstration that the alternative investigative procedures would not need to be standard contemplated by the statute. In interpreting the statute in this particular instance, I think it is essential that the approach taken be not a literal mechanical one, but one of a common sense application to the circumstances presented. There was sufficient information before the court in Queens County as to have determined that there was criminal activity being carried on by a significantly large number of people in the area of stolen property, particularly stolen automobiles.

The court could also reasonably have determined that the individuals were acting cautiously, that they were sensitive to the potential of police

investigation and surveillance, and that the full scope of the criminal conspiracy, if it existed, would not have been determined, except by means of the use of the Wire Taps, requested.

If word of the investigation were to leak out to anyone of the members of the group, which apparently was involved at the time of the application for the Queens County Order and the extensions thereof, if that word should get out that there was an investigation in progress, that could have terminated, for all practical purposes, any opportunity by the Queens County New York City Police to have obtained the additional information which they were entitled to seek.

With respect to the sealing requirement on the Queens County Wire Taps, there is no question. There was a delay of several days between the completion of the tap and the time that they were sealed. The argument advanced, particularly on behalf of the defendant Quinn, is that the warrant does not include the orders extending the warrant and that each thirty day period authorized by the warrant, the first extention and second extention, must be considered as separate units, for purposes of the sealing requirements.

That argument, the Court cannot accept. The Federal Statute upon which the statute is modelled, speaks in terms of an order authorizing the wire taps and extensions of the Order. The State Statute does not use the term Order. It speaks of a warrant.

In the paper work, which was involved in the Queens County tap, a warrant was issued. The subsequent application did not result in documents used by the participants as new warrants, but they were orders extending the original warrant. I therefore

interpret the meaning of the New York Statute, with respect to the sealing requirement, to be that the sealing must take place at the termination of the wire tap authorized by the original warrant, and as it may have been extended by subsequent extension orders.

With respect to the sealing, the time lapse between determination of the tap in Queens County and the sealing, the affidavits and the stipulated facts so that the tap was terminated, the tapes were immediately brought to the District Attorney's Office. An application was prepared for the sealing and it was prepared on July 25. It was a Thursday. The Secretary who prepared the application, who customarily processed these matters in the Queens County District Attorney's Office, called the Chambers of the Justice that had issued the original wire tap warrant and found that he was not in. He was not in the following day. The next two days were Saturday and Sunday. It was learned according to the evidence presented, I believe on Tuesday, that that justice was on vacation, whereupon, the application was submitted on the following day, the 31st to another justice who signed the Order and directed the sealing of the tapes. There is no suggestion of any tampering with the tapes in the interim.

The evidence shows that the tapes were kept in the vault of the District Attorney's Office, which had limited access on the combination lock during the interim period. It has been stipulated that the other justices were available during the interim period.

Under all the circumstances, I do not find that the delay in the submission of the tapes for sealing is unexplained, nor do I find that the delay

is an unreasonable one under the circumstances presented by the record. I note that the two New York State cases which have interpreted the word immediately at the New York Statute have both reached the conclusion that the word immediately does not mean instantaneously it is not to be interpreted literally but one of them, People against Carter, speaks in terms of without unnecessary or unreasonable delay and Blanda - speaks in terms of promptly, within reasonable diligence, depending on the circumstances in each case.

I find from the evidence here that there has been no unreasonable delay and that the time lapse in sealing has been explained and form no basis for suppression.

With respect to the notice requirement as applied to the Queens County Tapes, again, as I said before, the touch stone of relief under the notice requirement is prejudice. There has been no claim by any of the defendants through prejudice here.

I recognize that there is a split in the circumstances on this rule. The rule in the Second Circuit, however, seems to be clearly stated in the U. S. against Manfriedi and U. S. against Principi.

I understand a case presenting this issue, the U. S. against Donovan, is presently pending in the United States Supreme Court. Till that Court makes a different finding, draws a different conclusion, this Court is bound by the determination of the Second Circuit that prejudice is necessary for a suppression on the grounds of failure to receive statutory notice. There is no question here but that the defendants were given, all of the defendants,

whether or not they were required to, they were given notice of the taps, in sufficient time in advance of trial to investigate the taps and to make whatever motions which they deemed appropriate. They have made the motions which already have consumed two days in part-time discussion and presentation of evidence. So, there is no question that therehas been sufficient opportunity for the defendants to meet whatever may have been involved in the taps.

The functional purpose of the notice has been met even though the statutory requirements may not have been strictly complied with.

With respect to the arguments directed at the extension orders, arguments have been advanced as to the lack of probable cause, inadequate statement of other investigative techniques and the absence of a specifically designated offense. I reject all of those arguments, based upon the information presented to the Justice on each occasion. I find that there is sufficient information before him to authorize the issuing of the two extension orders.

There is one other argument, going back to the Nassau County Tapes. It developed on the testimony of Sergeant Medonia that two tapes had been taken, one of them the complete transcript or a complete recording of all telephone conversations that transpired. The second tape that was taken was a limited one, restricted in accordance with the direction of the Court to conversations relating to the particular criminal activities described in the Order authorizing the Nassau County Taps. The claim was made that the fact that the Nassau County Police had taken a complete tape necessarily invalidated everything else which occurred. I cannot accept the argument, in view of the testimony

by Mr. Medonia that the complete tape was not one which could have been monitored while it was being taken, that it was taken solely for the purpose of answering any questions which might arise, that no one has listened to the complete tape since it was taken. I further find that the argument which is raised is centrally one of minimization, but since there has been no attempt, no attempt first to use the Nassau County tapes, in evidence, secondly, there has been no attempt to use the complete tape, therefore, there does not appear to be any need for minimization, whether or not minimization might be called in for some other action, other circumstances, should some one at some time attempt to make use of the complete tape.

I don't have to determine, for present purposes, the circumstances of the making of the complete tape and it does not warrant any relief being granted to the defendants on this motion.

In short, gentlemen, the motions for suppression are denied in all respects, with respect to the wire taps, with the one qualification, which I added, with respect to Mr. Fury. It was without prejudice to any relief which might be appropriate with respect to the suppression of the particular guilty plea which he may have entered in ignorance of the existence of the Nassau County Wire Taps. In view of that, it appears that Mr. Bova is not a poison fruit, as the tree, the Queens County Wire Tap is not a poison tree. So, the motions are denied.